



FINAL REPORT

Levee and Drainage District Law Study Committee

January 2011

MEMBERS:

Senator John P. "Jack" Kibbie, Co-chairperson
Senator Merlin Bartz
Senator Thomas G. Courtney
Senator Gene Fraise
Senator Tim L. Kapucian

Representative Helen Miller, Co-chairperson
Representative Henry V. Rayhons
Representative Sharon S. Steckman
Representative Annette Sweeney
Representative Andrew J. Wenthe

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AUTHORIZATION AND APPOINTMENT

The Levee and Drainage District Law Study Committee was established by the Legislative Council and charged to "[r]eview Iowa law on levee and drainage districts and make recommendations for addressing recent court rulings interpreting the law." The Study Committee was authorized to hold one meeting.



Levee and Drainage District Law Study Committee

I. Committee Proceedings

The Committee conducted its authorized meeting in the Statehouse on Wednesday, December 15, 2010.

II. December 15, 2010, Meeting

A. Overview

The Committee adopted rules and elected Senator Kibbie and Representative Miller as permanent co-chairpersons. The Committee considered presentations by public officials and private citizens, including representatives of a number of state and local governments and individuals discussing issues regarding levee and drainage districts.

B. Update on Drainage and Levee Districts and Issues Associated with Drainage Systems

The Committee considered a presentation by Mr. Dean W. Lemke, Natural Resources Engineer Supervisor, Division of Soil Conservation, Department of Agriculture and Land Stewardship. Mr. Lemke discussed the history, investment in, and economic importance of Iowa's drainage districts; the impact of farming upon the natural environment, including the channeling of nitrogen and phosphorous to rivers including the Mississippi and the creation of zones in the Gulf of Mexico where oxygen has been depleted below a level necessary to support marine life (the so-called hypoxia issue); and the possibility of increased federal regulation. Mr. Lemke discussed initiatives to create and manage targeted wetlands which, in a cost effective manner, reduces the presence of nitrogen and phosphorous in drainage systems and state waters.

C. Management of Drainage Districts: Perspectives of Landowners

The Committee considered presentations by Mr. Russell Alderin, Mr. Todd Reinsager, and Mr. Bill Haag, residents of Muscatine County. Mr. Alderin, Mr. Reinsager, and Mr. Haag, who are residents of a housing district located within a drainage district referred to as Drainage District 13, which includes parts of Muscatine County, discussed a continuing legal dispute with the district's elected trustees involving a dredging operation adjacent to their backyards. According to the presenters, the trustees have already cleared part of the land and plan to deposit the dredged soil (so called "spoil") onto their land. They noted that the district did not presently have a right of easement which allows the use of their lands; that depositing the dredged soil on their lands would adversely affect their private sewage systems; that the trustees had never previously used their land to deposit spoil; that one trustee is a neighbor owning land on the other side of the drainage ditch which is not subject to the current plan; that the trustees have wrongfully frustrated their attempts to participate in the decision-making process (e.g., prevented them from attending public meetings); and the trustees are unwilling to engage in any kind of settlement discussions. Although not a Committee member, Senator James Hahn attended the Committee meeting and stated that the issue requires prompt attention.



D. Management of Drainage Districts: Perspectives of Trustees

The Committee considered presentations by Mr. Scott Power, Attorney, Aspelmeier, Fisch, Power, Engberg & Helling, P.L.C., Burlington; and Mr. Terry Martin, Trustee, Muscatine-Louisa Drainage District 13.

Mr. Power briefly described Drainage District 13, stressing the cost of maintaining the system, noting that the district elects its trustees based on the assessed value of land in the district, and opposed bills introduced during the last legislative session which would negatively impact the district and its governance (e.g., H.F. 246 amending Code Section 468.511). He disagreed with the earlier presenters, stating that their rights were not frustrated by the trustees, and noted that the power of eminent domain over land is prescribed in the Iowa Constitution (Art. I, Sec. 18) and statute (Code Section 468.126 and Code Chapter 6B), although the drainage district has only utilized the procedure once.

He offered two recommendations: that the compensation paid to trustees be increased and that current statutes be revised to allow drainage districts to consolidate.

Mr. Martin stated that the neighboring trustee had recused himself from voting, that the land of the recused trustee had been used to dispose of spoil from previous dredgings to his detriment from the pooling of precipitation, that it was a district policy not to assume liability for the deposit of spoil on land, and that such a precedent could impose a financial hardship on the district whenever a drainage operation resulted in the need to dispose of spoil.

Senator Kibbie stated that in his district the governing board was responsible for installing a drainage system that allowed a landowner to drain water from a land flooded due to the accumulation of disposal of spoil. Representative Sweeney stated that it might be positive to study the policies of different drainage districts. A number of members discussed the need to record easements by drainage districts that affect landowners. Mr. Power noted that many easements are only recorded on engineering plats, which are difficult to obtain.

E. State-Owned Lakes Located within Drainage Districts: Perspectives by Drainage and Levee Districts

The Committee considered presentations by Mr. John Torbert, Executive Director, Iowa Drainage District Association; Mr. Robert Brinton, Attorney, Law Offices of Brinton, Bordwell & Johnson, Clarion; and Mr. Don Etler, Agricultural Engineer, Kuehl and Payer, Ltd., Algona. Mr. Torbert, Mr. Brinton, and Mr. Etler discussed the unpublished district court case State of Iowa v. Board of Trustees of Palo Alto County Drainage District 80 (No. EQCVO23312) regarding Five Island Lake.

In part, they discussed the court's finding that the governing board failed to provide proper notice to the state regarding the proposed annexation of the lake because it was not addressed to the Director of the Department of Natural Resources (DNR), and that the state did not receive a benefit (or material benefit) notwithstanding any excess water from the lake that discharged into the drainage system. They also objected to a decision of the Executive Council, based on a recommendation of the Attorney General's Office, not to consider paying the assessment as a landowner as provided by statute. Mr. Torbert and Mr. Brinton emphasized that the district was burdened by relieving the lake of excess water, and noted that another district court had recently



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reached an opposite conclusion in a similar case relating to Rush Lake, State of Iowa v. Board of Trustees of Joint Drainage District No. 77 in Pocahontas and Palo Alto Counties (No. CVCV125819). Mr. Etler explained that the state's avoidance of paying its assessment has resulted in an increased assessment borne by the other landowners in the district. Members of the Committee and the panel discussed the Executive Council's policies regarding the payment of assessments on state-owned land including lakes. According to statute, an assessment against land under the jurisdiction of DNR is to be paid by the Executive Council (Iowa Code section 468.43). Members of the Committee also discussed the effect of a 1997 amendment to the Code section which removed an exemption prohibiting the Executive Council from assessing benefits below the ordinary high water mark of a sovereign state-owned lake (2007 Iowa Acts Chapter 194).

F. State-Owned Lakes Located within Drainage Districts: Perspectives by State Agencies

The Committee considered presentations by Mr. Wayne Gieselman, Administrator, Environmental Services, Department of Natural Resources; and Dr. David Dorff, Assistant Attorney General, Office of Attorney General.

Mr. Dorff stated that the Attorney General's Office filed the lawsuits challenging the state's obligation to pay assessments imposed on Five Island Lake and Rush Lake. He explained that in the Five Island Lake case, the district court determined that the state did not receive a benefit, and the Executive Council is only obligated to pay assessments for receiving actual benefits. Mr. Dorff continued by explaining that land benefiting from the district is not the state-owned lake but land located downstream from the lake and impacted by the lake's overflow. He opined that any payment made pursuant to statute should be classified as a subsidy to landowners and not as a benefit to the state.

Mr. Gieselman noted that the Executive Council has paid assessments to drainage districts. He agreed with Mr. Dorff that, in this case, no benefit accrues to the state because of the district's existence, and that the lake would assume its natural shape without protections benefiting landowners. He encouraged the Committee to consider how land is to be defined for purposes of drainage law (Code Chapter 468).

In response to questions by Committee members, Mr. Dorff acknowledged that the Executive Council could pay assessments for any state-owned land located above the high water mark of a state-owned lake. Mr. Dorff noted that the term "benefit" as used in Code Chapter 468 could be further clarified.

III. Committee Discussion and Recommendations

The Committee discussed the presentations considered during the meeting and made the following recommendations:

1. Code Chapter 468 should be amended to require that any notice by the district's governing board to a public entity, including a state agency or local government, that affects the rights or obligations of the public entity as a landowner, including as the owner of a lake, be delivered to the administrative head of the public entity or other



person who is authorized to accept delivery on its behalf. The notice should require proof of delivery with the recipient's signature and return of the proof of delivery to the sender.

2. During the following legislative session, the General Assembly should consider and enact any statutory changes necessary to clarify that state-owned lakes are to be classified and assessed by a levee or drainage district on the basis of the burden placed upon the district from water discharged from the lake and not upon any benefits which could be incurred from draining the lake.
3. The Executive Council and the Attorney General's Office should reexamine its policies regarding the payment of assessments imposed on state-owned lakes located within a levee or drainage district and make all necessary payments to districts which have submitted claims as provided in Code Section 468.43. The provision reads as follows:

When state-owned land under the jurisdiction of the department of natural resources is situated within a levee or drainage district, the commissioners assessing benefits shall ascertain and return in their report the amount of benefits and the apportionment of costs and expenses to the land, and the board of supervisors shall assess the amount against the land.

The assessments against lands under the jurisdiction of the department of natural resources shall be paid by the executive council upon certification of the amount by the county treasurer. There is appropriated from any funds in the general fund of the state not otherwise appropriated amounts sufficient to pay the certified assessments.

4. The General Assembly should consider legislation authorizing the Office of Citizens' Aide/Ombudsman to provide mediation services to assist in settling a dispute considered by the Committee involving a decision by the Board of Trustees in Drainage District 13 located in Muscatine County to deposit spoil resulting from a dredging operation onto the residential property of neighboring landowners.
5. In order to allow persons to determine if land is subject to an easement acquired at any time by a drainage or levee district, the General Assembly should consider supporting a current program administered by the Department of Agriculture and Land Stewardship, and should consider enacting any legislation, necessary for the compilation and internet publication of information that identifies such easements.

IV. Materials Filed With the Legislative Services Agency

The following materials listed were distributed at or in connection with the meeting and are filed with the Legislative Services Agency. The materials may be accessed from the <Additional Information> link on the Committee's Internet webpage:

<http://www.legis.state.ia.us/aspx/Committees/Committee.aspx?id=510>

1. Morning Session. Tentative Agenda (1st Version)
2. Morning Session. Tentative Agenda (2nd Revised Version)
3. Morning Session. Proposed Rules
4. Morning Session. Adopted Rules



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5. Morning Session. Background Information “Drainage and Levee Law” – Doug Adkisson, Legislative Services Agency
6. Morning Session. PowerPoint Presentation by Mr. Dean W. Lemke, Natural Resources Engineer Supervisor, Department of Agriculture and Land Stewardship
7. Morning Session. Mr. Alderin, Mr. Reinsager, and Mr. Haag; Residents of Muscatine – E-mail Correspondence, Photos
8. Morning Session. Mr. Alderin, Mr. Reinsager, and Mr. Haag; Residents of Muscatine – Related Documents
9. Morning Session. Mr. Alderin, Mr. Reinsager, and Mr. Haag; Residents of Muscatine – Photographs
10. Afternoon Session. Preliminary Materials – District Court Case: State Of Iowa v. Board of Trustees of Palo Alto Co Drain District 80 (No. EQCV013312)
11. Afternoon Session. Preliminary Materials – District Court Case: State of Iowa v. Board of Trustees of Joint Drainage District 77 (No. CVCV125819)
12. Afternoon Session. Preliminary Materials – Court of Appeals Case: Ray Ohrtman Revocable Trust v. Palo Alto Co Bd of Super (No. 8-479/07-1921)
13. Afternoon Session. Preliminary Materials – Iowa Code Section 468.43 (2010 Folio Edition)
14. Afternoon Session. Preliminary Materials – 1997 Iowa Acts, Ch. 194 (H.F. 336)
15. Afternoon Session. Statement by Mr. Power, Attorney; Burlington
16. Afternoon Session. Statement by Mr. Torbert, Executive Director; Iowa Drainage District Association
17. Afternoon Session. Statement by Mr. Brinton, Attorney; Clarion
18. Afternoon Session. Statement by Mr. Etler, P.E.; Algona
19. Afternoon Session. Powerpoint Presentation by Mr. Etler, P.E.; Algona
20. Afternoon Session. Proposed Recommendation #1 – Notice Requirements. (Amended in Committee)
21. Afternoon Session. Proposed Recommendation #2 – Assessment of State Owned Lakes
22. Afternoon Session. Proposed Recommendation #3 – Reconsideration by Attorney General and Executive Council